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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No 211

THE NATIONAL BANK OF THE REPUBLIC, PLAINTIFF IN ERROR,

vs.

REES J. MILLARD.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 12, 1869.

SUPREME COURT OF THE UNITED STATES.

No 444.

THE NATIONAL BANK OF THE REPUBLIC, PLAINTIFF IN ERROR,

vs.

REES J. MILLARD.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chief Justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Rees J. Millard, plaintiff, and the National Bank of the Republic, defendant, a manifest error hath happened to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this first day of March, in the year of our Lord 1869, and of the independence of the United States the 93d.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Rees J. Millard:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the National Bank of the Republic is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Justice.*

Service acknowledged this first day of March, 1869.

E. L. STANTON,
Att'y for R. J. Millard, Pl'ff.

2 In the supreme court of the District of Columbia, the 26th day of September, 1867.

REES J. MILLARD
vs.
THE NATIONAL BANK OF THE REPUBLIC. } At law.—No.

The plaintiff sues the defendant for that, on the 17th day of January, 1866, at the city of Washington, in said district, the defendant was, and for a long time, to wit, one year thereafter, continued to be, a depositary of public monies belonging to the pay department of the United States Army, and had and kept on hand, during all the time aforesaid, a large

amount of such public monies, subject to the order of Major J. A. Lawyer, a paymaster of the United States Army, to wit, the sum of ten thousand dollars.

That on the said 17th day of January, 1866, at Washington, in the District of Columbia, the said Major J. A. Lawyer, by his certain order in writing, commonly called a bank check, bearing date the day and year last aforesaid, ordered and directed the defendant to pay to the order of the plaintiff the sum of eight hundred and fifty-nine dollars and nine cents, and then and there delivered the said bank check to Rutger Teal & Co., attorneys for the plaintiff, authorized to receive said check; that afterwards, to wit, on the day and year aforesaid, some per-
3 son, to the plaintiff unknown, falsely and fraudulently forged the signature of the plaintiff on the back of said bank-check as an endorsement thereof; and that thereupon the defendant accepted the same, and paid the amount therein mentioned to some person unknown to the plaintiff.

That said payment was unauthorized by the plaintiff, and that he has never received any money or benefit by reason thereof.

That he has presented the said bank check to the defendant for payment, but payment of the same, or any part thereof, was refused.

By reason of the premises the plaintiff is entitled to receive from the defendant, and hereby claims, the sum of eight hundred and fifty-nine dollars and nine cents, together with interest thereon.

And also, for that the defendant is indebted to the plaintiff in the sum of eleven hundred dollars for money received by the defendant to the use of the plaintiff.

CHIPMAN & HOSMER,
Att'ys for Plaintiff.

The defendant in the above-entitled cause is to plead thereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

CHIPMAN & HOSMER,
Att'ys for Plaintiff.

(Endorsed:) Filed 23d October, 1867.

4 In the supreme court of the District of Columbia, the 23d day of October, 1867.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, defendant. } At law.—No. 4259.

The President of the United States to the marshal for said district, greeting:

Summon the defendant in the above-entitled case to appear in said court on or before the first special term thereof occurring twenty days after service of this writ, and answer the declaration herewith served, and warn him that, on default of so doing, the plaintiff may proceed to judgment and execution at the trial term of said court next after said service. And do you return this writ into the clerk's office immediately after service, so indorsed as to show the time & manner of executing it; and if you cannot serve it within six months, the day of its issuance exclusive, then return it into said office for renewal.

Witness D. K. Cartter, chief justice of said court.

R. J. MEIGS, *Clerk.*

CHIPMAN & H.

NOTE.—That the special terms of the court commence, &c.

Endorsed: Served a copy sum's & decla. on F. Coyle, pr. of the bank.
D. S. GOODING, *Marshal.*

NOV. 8*th*, '67.

5 In the supreme court of the District of Columbia.

THE NATIONAL BANK OF THE REPUBLIC
ats.
REES J. MILLARD. } At law.—No. 4259.

The defendant says it was never indebted as alleged.
BRADLEY & BRADLEY,
Atty's for Def't.

Filed 3d Dec., 1867.

In the supreme court of the District of Columbia, of the 6th day of December, 1867.

REES J. MILLARD
vs.
THE NATIONAL BANK OF THE REPUBLIC. } At law.—No. 4259.

The plaintiff joins issue upon the defendant's plea.
CHIPMAN, HOSMER & CO.,
Atty's for Pl'ff.

Filed 9th December, 1867.

In the supreme court of the District of Columbia, the 26th day of December, 1867.

Between { REES J. MILLARD, plaintiff, *and* NATIONAL BANK OF THE REPUBLIC, defendant. } At law.—No. 4259.

Chipman, Hosmer & Co., atty's for plaintiff. Bradley & Bradley, att'ys for defendant.

Last pleading filed Dec. 7th, 1867. To the clerk. (Filed 26th Dec., 1867.) Chipman, Hosmer & Co., for pl'ff.

6 Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court for said district, commencing the first Tuesday, 3d day of November, 1868.

TUESDAY, *November* 3, 1868.

By order of Chief Justice Cartter, presiding, the court is opened by proclamation of the marshal.

THURSDAY, *December* 10, 1868.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, def't. } At law.—No. 4259.—Cal. 178.

Come as well the plaintiff, by his attorney, Mr. Edwin L. Stanton, as the defendant, by its attorney, Mr. Bradley, and a jury of good and

lawful men of this district, to wit: Richard Langley, Edward Lycett, William F. Given, William Warder, Isaiah Brissey, C. W. Dulin, Jonathan Kirkwood, Martin Van Slycke, A. H. Boucher, H. D. Boteler, Robert Saxton, and T. B. Stahl, who, being sworn to try the issue joined, are respited until the meeting of the court to-morrow.

7 SATURDAY, *December 12th*, 1868.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, def't. } At law.—No. 4259.—Cal. 178.

And now again come here the parties aforesaid, by their respective attorneys aforesaid, and the same jury who were respited yesterday, who, having received the instructions of the court, upon their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by reason of the premises is the sum of eight hundred and fifty-nine dollars and nine cents, principal of the check sued on, with interest thereon from January 17, 1866, besides costs.

And thereupon the defendant, by its said attorney, gives notice of a motion for a new trial.

THURSDAY, *December* 17, 1868.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

REES J. MILLARD, pl'ff,
v.
THE NATIONAL BANK OF THE REPUBLIC. } At law.—No. 4259.—Cal. 178.

The defendant, by its attorney aforesaid, in pursuance of the notice aforesaid, now here moves for a new trial, and assigns the following reasons therefor:

1st. The verdict is against the weight of the evidence.

2d. For the causes assigned in the defendant's bill of exceptions.

3d. Because of newly-discovered evidence set forth in the affidavit of Fitzhugh Coyle, herewith filed.

8 REESE J. MILLARD
vs.
NAT'L BANK OF THE REPUBLIC. } No. 4259.

In open court comes the defendant, this 16th day of December, A. D. 1868, and, by Joseph H. Bradley, jr., its attorney, assigns as reasons for its motion for a new trial that—

1st. The verdict is against the weight of the evidence.

2d. For the causes assigned in the defendant's bills of exceptions.

3d. Because of newly-discovered evidence set forth in the affidavit herewith filed.

Affidavit.

REESE J. MILLARD
vs.
NAT'L BANK OF THE REPUBLIC. } No. 4259.—Law.

The defendant in this cause, by Fitzhugh Coyle, its president, deposeth and saith that since the verdict was rendered herein by the jury, he has

discovered new and pertinent evidence to the subject-matter of this suit, which he did not know of before the rendition of said verdict, and had no means of ascertaining theretofore, and which, in point of fact, was discovered only by means of the developements of said trial
9 through information derived mainly from documentary testimony in the exclusive possession of the plaintiff's attorneys of record, to which the defendant had no access until the same was produced at trial by the plaintiff under a subpœna duces tecum, issued at the instance of the defendant; that by a disinterested, credible witness, A. K. Browne, an attorney of this court, he will prove that said Browne was, in 1865, a member of the firm testified to in this cause of Harvey, Dietrich & Browne, that the original claim subsequently represented by the check in evidence in this cause, was sent to said firm for collection by one Brockaway, of Bloomington, in the State of Pennsylvania, acting for the plaintiff, Reese J. Millard, and that said firm undertook the prosecution of said claim by authority of a power of attorney, received in the course of correspondence with said Brockaway, from said Brockaway, executed by one Reese J. Millard, and containing, among other powers, a power of substitution, and also authority to collect said claim and endorse for said Millard any check or draft for the same, or authority to that effect; that subsequently, by virtue of authority to substitute, the said Browne himself transferred said power of attorney by endorsement in his handwriting, to the firm of Teal Browne & Co., testified to in said cause, and thereby terminated the connec. of Harvey,
10 Dietrich & Browne, aforesaid, with said claim. This affiant further deposeth that on the day the aforesaid developements were made, he sent a special messenger to look for said Browne two or three times, without succeeding in finding him, and has since learned from said Browne that, on business as trustee for the public schools, he was absent from his place of business all that day, and could not easily have been found.

FITZHUGH COYLE,
President Nat. B'k Rep.

Subscribed and sworn to before the undersigned, a notary public, this 16th day of December, 1868.

[SEAL.] CHARLES BRADLEY,
Notary Public.

11 THURSDAY, *December* 31, 1868.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

REES J. MILLARD, plaintiff, } At law.—No. 4259.—
v. } Cal. 178.
THE NATIONAL BANK OF THE REPUBLIC, def't. }

And now come here again the same parties, by their respective attorneys, and thereupon, upon argument of the defendant's aforesaid motion for a new trial, it is overruled; whereupon it is considered that the plaintiff recover against the defendant the sum of eight hundred and fifty-nine dollars and nine cents, with interest from January 17th, 1866, in manner and form aforesaid found, and $ for his costs of suit, and that he have execution thereof.

SATURDAY, *January 9th*, 1869.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, def't. } At law.—No. 4259.—Cal. 178.

And now comes the defendant, by its attorney aforesaid, and files its bill of exceptions to the ruling of the justice on the trial, and it is ordered that the same be made a part of the record.

12 In the supreme court of the Dist. of Columbia.

REES J. MILLARD
v.
NATIONAL BANK OF THE REPUBLIC. } At law.—No. 4259.

On the trial of this cause, the plaintiff, to maintain the issue on his part joined, offered and gave evidence to show that he was an officer of the army of the U. S. in the years 1864 and 1865, and as such had a claim for arrears of pay due him by the United States, which was adjusted and allowed, and ordered to be paid in the sum of $859 09; that J. A. Lawyer, a paymaster in said army, for payment of said arears of pay, drew and issued his check on the defendants in the words and figures following:

J. A. LAWYER,
Brevet Lt Col. & P. M. U. S. A.

No. 307. WASHINGTON, D. C., *January* 17, 1866.

The National Bank of the Republic:

Depository of Public monies and financial agent of the United States.

Payable at the Central National Bank, New York.

Pay to the order of Rees J. Millard, eight hundred and fifty-nine $\frac{9}{100}$ dollars.

$859\frac{09}{100}$. J. A. LAWYER,
Paym'r, U. S. A.

(Stamped:) Received payment. Jno. T. Hill, cashier.

(Indorsed:) Rees J. Millard. Rutger Teal & Co. Pay to Jno. T. Hill, esq., cashier, or order. L. HUYCK, *Pres.*

(Stamped:) Paid at the Central National Bank.

And proved the genuineness of said check; that the defendants were, on May 31st, 1865, duly designated, and have ever since continued to be, a depositary of public money and financial agent of the United States for the custody, transfer, and disbursement of public money; that the defendants had funds for the payment of said check; that the plaintiff did not endorse his name upon the said check, nor in any manner authorize any one else to so endorse it; that the said check was presented to the defendants and was paid and cancelled by them; that afterwards it came into the possession of the plaintiff, and he caused the same to be presented to the defendants with information of
13 the forgery of plaintiff's name thereon, and the defendants refused to pay the same—and rested.

The defendants then pray the court to instruct the jury that on the whole evidence the plaintiff is not entitled to recover, which instruction the court refused to give, and to said refusal the defendants, by their counsel except, and pray the court to sign, seal, and enrol their first bill of exceptions, which is done this 12th of Dec., 1868.

D. K. CARTTER, [SEAL.]
Ch'f Justice.

The defendants, to maintain the issue on their part joined, then gave evidence tending to show that Rutger Teal & Co. had been recognized at the office of the Second Auditor of the Treasury as agents of the plaintiff; that it is the rule of said office to so recognize no person without the production of a power of attorney, but there is no record in said office of the production of a power of att'y in the adjustment of plaintiff's accounts in said office, and no means of ascertaining whether or not the aforesaid rule was observed in the adjustment of plaintiff's accounts; that said Teal testified that he had previously received by mail, directly from plaintiff, a power of attorney from plaintiff to said Teal, and had corresponded directly with plaintiff in relation to his accounts; that afterwards, after the production of other testimony, said Teal testified that he had never corresponded directly with plaintiff, and had never received or held a power of attorney directly from plaintiff to said Teal; and the plaintiff testified that he had never himself corresponded with any one in Washington in relation to said claim; that Rutger Teal had a power of attorney purporting to be executed by the plaintiff to Harvey, Dietrich & Browne, attested by two witnesses, and containing a power of substitution in form following:

14

"Know all men by these presents, that I, , have made, constituted, and appointed, and, by these presents, do make, constitute, and appoint, Messrs. Harvey, Dietrich & Browne of Washington, D. C., my true and lawful attorneys, for me, and in my name, place, and stead, to adjust all claims against me in the War & Treasury Departments, and obtain certificates of non-indebtedness from the same; also to collect all monies due me by reason of services rendered to the government, and endorse any check or certificate made payable to my order; giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or substitute shall lawfully do, or cause to be done, by virtue hereof." On which purported to be endorsed a substitution by Harvey, Dietrich & Browne to Teal, Browne & Co., which paper was exhibited to the department; that after the adjustment of the plaintiff's claims the check offered in evidence was delivered to said Teal, and by him endorsed in the name of the plaintiff and the name of R. Teal & Co., and the money was received by him on it; that said power of attorney had passed out of the hands of said Teal, and after diligent search he cannot find it, and defendants were unable to ascertain the names of the witnesses thereto, if any; and that several papers required by the accounting officers of the treasury in the adjustment of plaintiff's accounts, had been received from one C. B. Brockway, who resided in the plaintiff's neighborhood—and there rested.

15

The plaintiff then, in rebuttal of said evidence, gave evidence to show that he had never executed a power of attorney to Harvey, Dietrich & Browne, nor to Teal, Browne & Co., nor to R. Teal & Co., nor to Rutger Teal, nor to any one else other than C. B. Brockway, a lawyer in his neighborhood, to whom he gave a power of attorney to procure an adjustment of his accounts; that he never authorized any one to receive payment of his claim nor to endorse his name; and on cross-examination the plaintiff testified that he had executed and signed certain papers relating to the adjustment of his accounts and the accounts of the soldiers in his company, and required therein by the accounting offi-

cers of the treasury, and which were brought to him for that
16 purpose by said C. B. Brockway, which he read at the time of execution & signing, and the specific contents of which he does not remember—and there the plaintiff rested.

The defendants then asked the court to give the following instructions to the jury:

"That unless the jury are satisfied from the evidence that the defendant accepted the check offered in evidence in favor of the plaintiff, or his assignees, or promised to pay the same to the plaintiff, or his assignees, he is not entitled to recover."

"That Rutger Teal & Co., as authorized agents to receive the check offered in evidence, as averred in plaintiff's declaration, were authorized to endorse the same & collect the amount thereof, and if the jury found from the evidence that the check was so endorsed & collected by said Teal & Co., the plaintiff is not entitled to recover."

"If from the whole evidence the jury find that the plaintiff, by reposing authority as attorney in Brockway, or other persons, facilitated the perpetration of a forgery of his name, by which the money for the check in evidence was unlawfully obtained of the def't by Teal and appropriated to his own use, then the plaintiff cannot recover in this action."

Which the court refused to give; to which refusal the defendants except, and pray the court to sign, seal, and enrol their 2d bill of exceptions, which is accordingly done this 12th day of December, 1868.

D. K. CARTTER, [SEAL.]
Ch'f Justice.

17 And thereupon the plaintiff asked the court to instruct the jury as follows:

"A power of attorney must be positively proved and strictly examined and construed. In respect to the authority delegated by, and the provisions, the execution, the genuineness, and the existence of an alleged power of attorney, the jury are not, in the absence of proof, upon inference or probability, to decide that an alleged power of attorney contained a particular provision, nor that an alleged power of attorney was duly and validly executed, nor that an alleged power of attorney even existed. A power of attorney is an undertaking agreed upon, established, acknowledged, delivered, and preserved by the solemn acts of the parties, as permanent repository, & of the proper evidence of the delegation of authority, of the character & extent of the authority delegated, of the acts authorized to be done by the agent, and of the manner in which he shall do them; and even when a power of attorney is produced it has to be strictly examined, its provisions have to be strictly construed, its strict meaning cannot be changed, and its genuineness has to be proved.

"In the present case, therefore, so far as the authority of another to endorse Millard's name upon this check depends upon an alleged power
of attorney, the jury should consider that endorsement as unau-
18 thorized unless the above requirements of proof of the existence, genuineness, and specific provision of the alleged power of attorney are fully & positively met."

Which the court did; to which the defendants except, and pray the court to sign, seal, and enrol their 3d bill of exceptions, which is accordingly done this 12th day of December, 1868.

D. K. CARTTER, [SEAL.]
Ch'f Justice.

Proceedings before the supreme court of the District of Columbia in general term, commencing the third Monday, 18th day of January, 1869.

THURSDAY, *February 4th*, 1869.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin and Wylie. Absent, Justice Fisher—holding the criminal court.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, def't. } At law.—No. 4259.

Argued by Mr. Stanton for the plaintiff, and Messrs. Bradley & Cox for the defendant, and submitted to the court.

19 SATURDAY, *February 20th*, 1869.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin, Fisher, and Wylie.

REES J. MILLARD, plaintiff,
v.
THE NATIONAL BANK OF THE REPUBLIC, def't. } At law.—No. 4259.

And now again come here as well the plaintiff as the defendant, by their respective attorneys aforesaid, and because it seems to the court that in the record and proceedings of the circuit court, and in the judgment thereof, there is no error, it is considered that the said judgment be, and the same is hereby, in all things affirmed; and it is further considered that the plaintiff recover against the defendants his costs by him sustained by reason of the appeal to this court, to be taxed by the clerk.

20 Know all men, that the National Bank of the Republic of the city of Washington, and Fitzhugh Coyle, of said city, are held and firmly bound to Rees J. Millard in the full and just sum of seventeen hundred dollars, to be paid to the said Rees J. Millard, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, the said obligors hereby bind themselves, their successors, executors, and administrators, jointly and severally, firmly by these presents. Sealed [sealed] with their seals, and dated the first day of March, eighteen hundred and sixty-nine.

Whereas the above-bounden, the National Bank of the Republic of the city of Washington, hath sued out a writ of error to the Supreme Court of the United States, and hath deposited and lodged a copy thereof for the use of the said Rees J. Millard in the clerk's office of the supreme court of the District of Columbia, in a certain cause lately pending in the said supreme court of the District of Columbia, wherein the said Rees J. Millard was plaintiff, and the said National Bank
21 of the Republic was defendant, in which said cause judgment was rendered for said plaintiff in the sum of eight hundred and fifty-nine dollars and nine cents, with interest from January 17, 1866, and costs, to be recovered of the said defendant:

Now, the condition of the above obligation is such, that if the said National Bank of the Republic shall well and truly prosecute the said writ of error with effect, and shall pay all such costs and damages as may be awarded against the said bank in case the said judgment shall be affirmed, then the above obligation to be void; otherwise to be and remain in full force and virtue.

In testimony whereof, the said National Bank of the Republic hath caused the seal of the said bank to be affixed hereto, and this bond to be signed by the president of the said bank, and attested by the cashier thereof, and the said Fitzhugh Coyle hath hereto set his hand and seal.

FITZHUGH COYLE,
Pres't Nat. B'k Rep.

22 SEAL. Nat. Bank of the Repub'c. Attest:

FITZHUGH COYLE. [SEAL.]

CHAS. BRADLEY, *Cashier.*

The foregoing bond is hereby approved this 1st March, A. D. 1869.

D. K. CARTTER, *Ch'f Justice.*

23 CLERK'S OFFICE OF THE SUPREME COURT
of the District of Columbia:

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing writings are true and complete copies of the originals that are now on file and of record in the clerk's office of said court, and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending, and lately decided, entitled—

REES J. MILLARD
v.
THE NATIONAL BANK OF THE REPUBLIC. } No. 4259.—Law.

In testimony whereof, I have subscribed my name and affixed the seal of said court this 23d day of February, A. D. 1869.

[SEAL.] R. J. MEIGS, *Clerk.*

24 (Indorsed:)

FEB. 24, 1869.

Writ of error allowed to Supreme Court on within judgment. Bond required in sum of seventeen hundred dollars.

S. P. CHASE,
Chief Justice U. States.

Two circumstances take this case out of

1. Bank paid check

2. Bank public depository —

1. Promise by A to B to pay C. money to

3. The promise may be implied —

Supreme Court of the United States.

THE NATIONAL BANK OF THE REPUBLIC
v.
REES J. MILLARD.
Dec. Term, 1869.

This is a writ of error to the Supreme Court of the District of Columbia.

CASE.

The defendant in error sued the plaintiff in error on a check drawn by a paymaster in the army, on the said bank, in favor of Millard for $809.50. The bank was one of the depositaries of public money. The drawer had funds there deposited to his credit as paymaster. The payee had been an officer in the army. His accounts had been settled through the agency of his attorneys, Rutger Teal & Co. The check was for the balance found due to him, and was by authority of the payee, plaintiff, delivered by the paymaster to those attorneys. It was endorsed by one of those attorneys in the name of the plaintiff, and also in the names of the attorneys, and he received the money on it from the bank.

The plaintiff in his declaration, page 2, avers that *the drawer, at the date of the check, delivered the said bank check to Rutger Teal & Co., attorneys for the plaintiff, authorized to receive the said check;* that afterwards, to wit, &c., some person to the plaintiff unknown, falsely and fraudulently forged the signature of the plaintiff on the back of said bank check as an endorsement thereof; and that thereupon the defendant accepted the same, and paid the amount therein mentioned, to some person unknown to the plaintiff.

That said payment was unauthorized by the plaintiff, and that he has never received any money or benefit by reason thereof.

That he has presented the said bank check to the defendant for payment, but payment of the same has been refused.

There is also a count for money had and received.

The plea was never indebted as alleged.

On the trial it was proved that Rutger Teal, one of the firm of Rutger Teal & Co., the plaintiff's attorneys, endorsed the plaintiff's name on the check, and under that the name of this firm, and received the money for it. The power of attorney under which Rutger Teal & Co. acted, was not produced, but its loss was accounted for, and proof of its contents was admitted, by which it appeared that the original power was given by the plaintiff to C. B. Brockway, with a power of substitution, and he substituted Rutger Teal & Co. in his place; that the power of attorney thus executed by plaintiff contained this clause: "*also to collect all moneys due me by reason of services rendered to the Government, and endorse any check or certificate made payable to my order.*" There was counter proof given by the plaintiff in person, "that he never authorized any one to receive payment of his claim, nor to endorse his name, (although) he had executed and signed certain papers relating to the adjustment of his accounts, and the accounts of the soldiers of his company, and required therein by the accounting officers of the Treasury, and which were brought to him for that purpose by said C. B. Brockway, which he read at the time of executing and signing, and the specific contents of which he did not remember."

PRAYERS.

Upon this case the defendant below prayed the Court to instruct the jury,

"That unless the jury are satisfied from the evidence that

the defendant accepted the check offered in evidence in favor of the plaintiff or his assignees, or promised to pay the same to the plaintiff or his assignees, he is not entitled to recover."

That Rutger Teal & Co., as authorized agents to receive the check offered in evidence, as averred in plaintiff's declaration, were authorized to receive the same and collect the amount thereof, and if the jury find from the evidence that the check was so endorsed and collected by said Teal & Co., the plaintiff is not entitled to recover.

If from the whole evidence the jury find that the plaintiff, by reposing authority as attorney in Brockway, or other persons facilitated the perpetration of a forgery of his name, by which the money for the check in said case was unlawfully obtained of the defendant by Teal and appropriated to his own use, the plaintiff cannot recover in this action.

The court refused to give the instructions, and the defendant excepted.

PLAINTIFF'S PRAYER.

A power of attorney must be *positively* proved, and strictly examined and construed. In respect to the authority delegated thereby, and the provisions, the execution, the genuineness and the existence of an alleged power of attorney, the jury are not, *in the absence of proof, upon inference or probability* to decide that an alleged power of attorney was duly and validly executed, nor that an alleged power of attorney even existed. A power of attorney is an undertaking agreed upon. established, acknowledged, delivered and preserved by the solemn acts of the parties, as permanent repository, and of the proper evidence of the delegation of authority, of the character and extent of the authority delegated, of the acts authorized to be done by the agent and of the manner in which he shall do them; and even when a power of attorney is produced it has to be strictly exam-

ined, its provisions have to be strictly construed, its strict meaning cannot be changed, and its genuineness has to be proved.

In the present case, therefore, so far as the authority of another to endorse Millard's name upon this check depends upon the alleged power of attorney, the jury should consider that endorsement as unauthorized unless the above requirements of proof of the existence, genuineness and specific provisions of the alleged power of attorney are fully and positively met.

The court gave this instruction, and the defendants excepted.

There is also an exception by the defendants (p. 6) to the refusal of the court to enter judgment for the defendant on the plaintiff's case in a chief. Without in any manner waiving that exception, the Bank will insist in argument here that the court below erred in refusing it. The principle on which it was based is the same as is more distinctly presented in the first branch of the defendant's prayers on p. 8.

ASSIGNMENT OF ERRORS AND POINTS.

First. The court erred in refusing the instruction to the jury that the plaintiff could not recover upon his own proof in chief; and also in refusing the prayer, that, unless there was proof that the defendant accepted the check in favor of the plaintiff or his assignees, or promised to pay him or them, the plaintiff could not recover in this action.

1. A bank check closely resembles an inland bill of exchange. It is payable at sight, on demand, without grace, and must be presented for payment as soon as may be conveniently practicable.

It gives no right of action in assumpsit to the holder against the drawee until he has accepted it, or come under some distinct obligation to the holder to pay that check.

All the elementary writers agree on these points: Chitty, (7th Am. Ed.,) 512; Byles, 1, 14, and note (1); Story, § 489; Grant on Banking, 34 45, 96; 2d Parsons on Bills and Notes, 59, 60, 61, and note "j," ed. 1863; Levi Mer. Law, 259.

All the decided cases, except two, are the same way: Chapman v. White, 2 Seld,, 412; Butterworth v. Peck, 5 Bosworth, 341; Ballard v. Randall, 1 Gray, 605; Harker v. Anderson, 21 Wend., 373; Dykers v. Lerther Manufact's Bank, 11 Paige, 616; National Bank v. Eliot Bank, 5 Am. Law Reg., 711, and Parke B. argu. in do. in Bellamy v. Majoribanks, 7 Each. (W. H. & G.) 404; and see the note in Parsons above referred to, and in note (1) in Byles, p. 21; In re Brown, 2 Story Rep., 502.

They proceed on the ground that there is no *promise* by the drawee, and therefore no privity of contract between the holder and the drawee.

The cases on the other side are Fogarties & Stillman v. The State Bank, 12 Richardson (law So. Carolina) 518, and Vanbibber v. Louisiana Bank, 14 Ann., 481. In each case the courts, respectively, proceed on the assumption that by the law merchant, establishing a usage having the force of law the bank or banker on whom a check is drawn is the agent of the depositor, under a contract to pay the funds deposited, to the order of the depositor; and the order of the depositor creates an obligation in favor of the payee or holder of the check which transfers this agency *quo ad* the amount of the check, and creates an equitable and legal right in favor of such payee or holder, which may be enforced by action at law or in equity.

The cases already referred to show that this is purely an assumption by those two courts; that no such commercial law or law merchant exists, and indeed it is conceded by Judge Johnson, in his opinion in the first named of the two cases, that in the books and reports "we do not hear of such an action on the part of the holder."

2. Upon elementary principles the holder of a check without acceptance cannot have a right of action against the bank or drawee.

This court has settled in Thompson v. Riggs, 5th Wall., 678, that the relation of depositor and banker is that of debtor and creditor, The moment the deposit is made it becomes part of the property of the bank, under a contract to repay the amount to thesdepositor, or to his order, at such times and in such amounts as he may direct. The funds are no longer the funds of the depositor but of the bank, and the depositor is the creditor for the principal sum. He has a right to draw for them in such sums as he may see fit. But it follows that this must be by a bill of exchange, or draft, or order of a creditor on his debtor, and not an order of a principal on his agent. To that extent the check has all the properties of a bill of exchange, and gives no right to the payer or holder to enforce payment against the drawee until he has come under some obligation, after notice, to pay it. If this is not so, when is the contract to begin? Is it when the check is delivered to the holder? Then a bank might be ruined, for it is bound to pay all checks on presentment and in the order in which the checks are presented, and it cannot be affected by the fact that the credit has been exhausted. Is it when the check is presented? Then the refusal to pay is to be tortured into an engagement to pay. The demand of payment involves a previous, existing right.

Again: the obligation of the banker to the depositor is perfect. The latter may maintain an action for the whole deposit; he may countermand any and all the checks he has given; if he has funds when the check is presented. he may maintain an action on the case for a refusal by the banker to pay his check. The effect would be that a right of action, for the same money in the hands of a third party, existed in two persons, upon one promise, at the same time.

There is no analogy between the case of a debtor agreeing

5. Amn Law Reg. 717 — Elliot Bank.

2. Selden, 412.

with his creditor to pay the amount of the debt to a named party, or a party to be named by his creditor, as was the leading case of Weston *vs.* Barker, 12 Johns, 278, and the case of customer and banker. Those are cases of an *express contract.* This is a case of implied contract, in which no person is named or to be named as the payee. In any other case but that of customer and banker the law would not tolerate the splitting up the credit into a hundred rights of action against the will of the debtor, as is said by this court in Mandeville *vs.* Welch, 5 Wheat, 377.

Besides, a check is uot payment unless it is received as such, the payee taking the risk of its being paid, and a receipt for a check, or even the surrender of a bill of exchange on receiving a check is not payment unless the check is paid. (See cases already cited.)

3. Nor are these rules of law modified by the facts that the bank, in this case, was one of the depositories of the Government and the check drawn by a public officer having funds there, in favor of a public creditor. The check was a commercial negotiable instrument. It was subject to all the laws governing such paper. If the Government had drawn the check on its own funds, the same rule must prevail. (The United States *vs.* The Bank of the Metropolis, 15 Pet., 377.)

4. Nor can the general counts aid the plaintiff. The rule *ex equo et bono* has no application to cases where there is no privity between the parties. Here no contract at law, express or implied, can be found between the parties, (Arch. N. P., 175; Grant on Banking, 34, 96. Even in equity no obligation was created. (See the case in 11 Paige, 616, Dyker *vs*, The Leather Manufacturiug Bank.)

5. Nor can the plaintiff's case be helped by the fact that the bank paid the check when presented. It had not then been in the hands of plaintiff. It was presented without his authority or knowledge. No promise to pay him can be be inferred from this.

1 Bruce 61. Hoboken city Bank

46. Penn 410. Lloyd v. McCaffrey. Wright

13 Allen 445. Dana

SECOND.

The court erred in refusing the third branch of the defendants' prayer, respecting the facilitatipg by the plaintiff of the alleged forgery.

1. The general principle of law is stated by this court in The Bank of the Metropolis against The New England, 1 How.

The proof in this cause shows that Rutger Teal & Co., the parties named in his declaration as the attorneys of the plaintiff, authorized by him to receive the check, and to whom it was delivered, (p. 2,) were also "recognized as agents of the plaintiff, and settled and adjusted the plaintifi's account," and that Teal, one of the said attorneys, indorsed the check in the name of the plaintiff and also the name of his firm and received the money on it. There was no concealment, and no attempt at concealment, and nothing to put the bank on its guard. There was no negligence in the bank under the circumstances.

On the other hand, the plaintiff had given every credit to Teal & Co., and by trusting them had facilitated the forgery, if it was a forgery of his name.

The drawer and the drawee are innocent parties. The loss, if any, should fall on the plaintiff

2. And this view is sustained by authority which is quoted with approbation by every text-writer on bills and notes so as to have become incorporated into the law merchant. (See Byles on Bills, 125; Horsfall *vs.* Fauntleroy, 10 B. & C., 755; Young *vs.* Grote and others, 4 Bing, 254.

THIRD.

The Court erred in instructing the jury as prayed by the plaintiff.

The plaintiff, to account for his possession of the check, and to show that it had been rightfully delivered to him,

averred in his declaration that it had been delivered to Rutger Teal & Co., his attorneys, authorized to receive it. No power of attorney was produced. The defendant proved the existence of the power of attorney, and accounted for its loss. They also gave evidence of the *form* of the power of attorney. Thus the fact of the existence of *a* power of attorney, alleged in the declaration, was established and the contents shown.

It is difficult to say what the Court does mean in the instruction. The *execution* and existence of the power is averred by the plaintiff—its loss accounted for, and secondary evidence admitted to prove its contents. Yet the Court says the jury are not *in the absence of proof, upon inference or probability* to decide that an alleged power of attorney contained a particular provision, nor that an alleged power of attorney was duly and validly executed, nor that an alleged power of attorney ever existed. That is, when the plaintiff alleges the existence of a power of attorney, which is lost, the jury cannot find its contents upon secondary proof offered by the defendant.

2. But this is not all. The Court proceeds to say, "and even where a power of attorney is produced, it has to be strictly examined, its provisions have to be strictly construed; its meaning cannot be changed, and its genuineness has to be proved. Therefore when the plaintiff has alleged the existence of a power of attorney, and the defendant has been let in to give and has given evidence of the contents of *that* power, the jury should consider an endorsement made under the authority of the power as shown by such secondary proof unauthorized unless the above requirements of proof of the execution, genuineness, and specific provision of the alleged power of attorney are fully and positively met.

Obviously, if this means anything, it means that the secondary proof, the weight and value of which was exclusively

for the consideration of the jury, was to be disregarded by them as no proof had been given of the execution, or genuineness of that paper, the existence of which was alleged by the plaintiff and affirmed by the defendant.

3. It was well calculated to mislead the jury, and, therefore, vicious and erroneous.

FINALLY.

The Court erred in refusing the second branch of the defendant's prayer, viz: That Rutger Teal & Co., as authorized agents to receive the check, were authorized to collect the amount thereof, and to endorse it for that purpose.

This instruction is to be read in connection with the antecedent proof stated in the bill of exception.

The plaintiff had alleged a power of attorney given by him to Rutger Teal & Co. to receive the check, but had failed to offer any proof of it. The defendant then by strictly legal proof gave evidence of the form and contents of the power so alleged under which Rutger Teal & Co. acted for the plaintiff. It was a question of fact for the jury to find whether that was or not the form of the power, and a question of law for the Court to determine the effect of such a power if found by the jury. It is very clear that the rule of law upon the finding of such a power by the jury is as stated in the prayer, and the Court ought so to have instructed the jury. The refusal to do so was error.

BRADLEY & COX,
Atty's for Plaintiff in Error.

Supreme Court of the United States.

No. 211.

THE NATIONAL BANK OF THE REPUBLIC,
Plaintiff in Error,

vs.

REES J. MILLARD.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

EDWIN L. STANTON,
For Defendant in Error.

Jos. L. Pearson, Printer, cor. 9th and D sts.

Supreme Court of the United States.

No. 211.

THE NATIONAL BANK OF THE REPUBLIC, PLAINTIFF IN ERROR,

vs.

REES J. MILLARD.

In error to the Supreme Court of the District of Columbia.

Brief for Defendant in Error.

The defendant in error, plaintiff below, on leaving the military service of the United States, in 1865, was a creditor of the government in the amount of $859.09, for arrears of pay as captain. In settlement of this account the proper paymaster of the army drew and issued a check upon the plaintiff in error, as follows:

J. A. LAWYER,
Brevet Lt. Col., P. M., U. S. A.

WASHINGTON, D. C., *January* 17, 1866.

The National Bank of the Republic,
Depositary of Public Moneys and Financial Agent of the United States,
(Payable at Central National Bank, New York,)

Pay to the order of Rees J. Millard eight hundred fifty-nine $\frac{9}{100}$ dollars.

J. A. LAWYER,
Paymaster U. S. A.

The plaintiff in error was then, and still continues, a fiscal agent of the United States, for the custody, transfer, and disbursement of funds for the government; and it had funds for the payment of this particular check and debt. The plaintiff in error paid the check on a forged endorsement of the defendant in error's name, on the credit and security, however, of three subsequent endorsers, two of whom were banks, and from any of whom the plaintiff in error could recover and thus protect both its own depositor and his payee.—(*Canal Bank v. Albany Bank*, 1 *Hill*, 287.) Ascertaining the forgery, and recovering possession of the check, the defendant in error exposed the fraud and demanded payment to himself, which was refused. Thereupon he sued the plaintiff in error, declaring on a special count, and also on a general count for money had and received to his use.

At the trial the plaintiff in error excepted to the refusal of the court to give four of the instructions asked by it, and also to the granting of one of the instructions requested by the defendant in error.

The rulings of the court below, now here for review, relate to three points.

I.

The court below did not err in refusing an instruction that an agent, authorized to receive a check drawn payable to the order of his principal, is also authorized to endorse the check in the name of his principal and to collect the amount.—(3d instruction asked by plaintiff in error.) *On the other hand the court properly charged the jury that, so far as the authority of another to endorse the name of the plaintiff below on the check in controversy depended on an alleged power of attorney, the burden of proof was on the defendant to fully establish this authority; that a power of attorney becomes, by formal compact between the parties, the memorial and proper evidence of the delegation of authority, of the nature and extent of such authority, and of the manner of performance of the acts authorized to be*

done; that on production of an alleged power of attorney in evidence, its genuineness must be proved, its provisions strictly examined and construed; and on non-production of the alleged instrumeut, the jury should not, without proof and on their own inference, decide that it contained a particular provision, or even that a genuine power of attorney existed.—(Instruction granted at instance of defendant in error.)

The burden of proof was on the plaintiff in error to establish authority for the endorsement.—(2 *Parsons Bills*, 81.) An absent power of attorney must be proved like a deed.—(*Lord Melville's case*, 29 *Howell St. Tr.*, 714–723; 1 *Phillips Ev.*, 452.) Written authority must be closely examined and strictly construed; there can be no "reading between the lines," and the power of the attorney is rigidly limited to the strict construction of what is written. —(5 *B. and Ald.*, 204; 6 *Cush.*, 123; 1 *Parsons Contracts*, 95, 96; *Edwards' Bills*, 85, 86; *Story Agency*, *sec.* 68.)

The propriety of giving instruction to this effect is apparent on the record.—(*Page* 7.) Much indulgence had been extended to the plaintiff in adducing loose testimony upon these matters. The court would have been warranted in withdrawing it wholly from the jury. First, one Teal testified in behalf of the plaintiff in error, that he had held a power of attorney to himself, directly from the defendant in error, and had corresponded directly with the latter. Afterwards, necessity for a new and conflicting theory arising, the same witness testified on the same side, that he had had neither that power of attorney nor that correspondence. Then parol testimony was adduced as to the contents of an absent alleged power of attorney to Harvey, Deitrich & Browne, purporting to be signed with the name of the defendant in error, to be attested by two witnesses, and to be endorsed with a substitution of Teal, Brown & Company, but not purporting to bear any substitution to R. Teal & Co., by whom the check was endorsed. The attesting witnesses

were not called nor accounted for; there was no evidence as to the genuineness of what purported to be their signatures; no evidence as to the genuineness of what purported to be the signature of the defendant in error; no evidence that he had ever executed the instrument. On the contrary, all this was denied. If the instruction was right the case certainly required it to be given.

II.

The court properly refused to charge the jury that the plaintiff below could not recover, if by reposing authority in Brockaway or others, he had facilitated the forgery by which Teal unlawfully obtained the money for the check.—(4th instruction asked by the plaintiff in error.)

All that appears on the record concerning Brockaway is, that he is a lawyer, and a neighbor of the plaintiff below, and was employed by him in the business of adjustment of his accounts with the government. Reposing authority in him was not the *proximate cause* of the forgery by Teal And the employment of a lawyer and a neighbor is not an act of *negligence.*

III.

The court properly refused to rule that the plaintiff below could not recover unless the defendant had accepted, or had promised the plaintiff to pay to him or his assignees the particular check in controversy.—(1st and 2d instructions asked by defendant in error.)

The theory of the instructions to this effect, which were asked by the plaintiff in error is, that the defendant in error stands in the same attitude as the payee of an unaccepted bill of exchange dishonored by the drawee.

1. But while a check resembles a bill of exchange in

some respects it does not in all; and an argument from analogy must have regard for the differences.

A bill of exchange is, prima facie, a single transaction between the drawer and the drawee; the latter does not hold himself out as the custodian and disburser of the former's money. He may not be even a debtor to the former, nor hold any funds for him. And if he has possession of money belonging to him, though an order to pay over the exact sum, would, on notice, operate as an equitable assignment, yet he is under no obligation to pay out the money in fragments, nor to different persons designated by the drawer. Hence, in the case of a bill of exchange, arises the necessity for the drawee's acceptance, which is recognition by him of the drawer's competence to give the direction expressed by the bill. From this admission results the effect of entitling the holder to demand payment when the bill falls due.

Obligation to accept, with the resulting right of holders who have relied on the faith of the promise, may be fairly implied from the custom of trade or the course of business between the parties.—(*Mandeville vs. Welch*, 5 *Wheaton*, 286; *Russel vs. Wiggins*, 2*d Story R.*, 237; *Carnegie vs. Morrison*, 2 *Metcalf*, 381.)

Now, bank checks are drawn on common repositories where many persons agree to keep their cash, to be always and immediately ready at their call or subject to their directions, in any amount, to any and every payee. A check, therefore, requires no acceptance. In respect to commercial paper, no custom is more prevalent, none more practically affects the dealings of men, than the usage and regular course of business out of which arise an understanding and expectation that a check, upon presentment for payment, and if the drawer has the money on deposit to meet it, transfers to the holder the title to the money it calls for, and will at once be paid as matter of right and not of favor. Upon the strength and convenience of this usage and understanding, checks pass

from hand to hand like cash, and are used in most payments and settlements between individuals and between banks. The promise implied from this usage, and held out to the commercial world by banks, is a valid assumpsit to an individual holder, and gives him a consequent right of action independent of acceptance of the particular check.

The weight of judicial authority is on the side of the holder's right of action against the drawee. The cases cited in opposition rest upon inference or obiter dicta. On the other hand, where the direct issue has been passed upon, the right of the holder to sue has been sustained. In Illinois it was so decided in *Munn vs. Burch*, 25 *Ill.*, 35, and the governing principle is affirmed in *Chicago Marine Insurance Co. vs. Stanford*, 37 *Ill.*, 168. In South Carolina the right of action of the holder has been sustained in two cases: *Fogarties vs. State Bank*, and *Ambler vs. State Bank*, 12 *Richardson S. C. Law R.*, 518. In Louisiana the same doctrine was held in 14 *La.*, 481.

In *Morse on Banks and Banking*, (1870,) 459–474, the question is examined elaborately, and the authorities reviewed, and the same conclusion reached.

The reasoning in support of the right rests upon that of this court in *Mandeville vs. Welch*, 5 *Wheaton*, 286, especially upon the doctrine there stated, that "an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as part of their contract." Reliance is also had on *Carnegie vs. Morrison*, 2 *Metcalf*, 381; *Weston vs. Barker*, 12 *J. R.*, 276; *Russel vs. Wiggins*, 2 *Story C. C. R.*, 237; *Story Bills, sec.* 20; *Id.*, 213; *Brewer vs. Dyer*, 7 *Cush.*, 337; 3 *Kent Com.*, 105, *note A*; *Beawes' Lex Mercatoria*, 371.

2. But independently of this general right of action of holders of checks against the bank, without acceptance or promise to pay a particular check, a payee whose check has been paid on a forged endorsement of his name can afterwards sue and recover, and the bank's refusal to pay

him or his assigns, instead of being a bar, as claimed by the plaintiff in error, becomes part of his cause of action.

In the case at bar, at the time the check was endorsed in the name of the plaintiff below, he could lay claim to it as his property. Upon an executed consideration it had been *issued* by the paymaster for the benefit of the plaintiff below. —(*Record, page* 6.) The language of the record, in statement of the testimony adduced for the plaintiff below, imports that there had been a transfer by and from the paymaster, for the benefit of the plaintiff below, of the right of possession to the check, which thereupon accrued to the latter. Furthermore, whether the receiver of the check for the benefit of the plaintiff below had antecedent authority matters not. For even without such antecedent authority, by the intent and purpose of the drawer, according to the representation of the receiver, by effect of subsequent waiving on the part of the plaintiff below of all objection to that single and separate transaction of delivery, and by effect of his ratification and adoption thereof, the delivery before the making of the forged indorsement enures to the benefit of the plaintiff below just the same as though the check had then been put into his own hand.—(*Flechner v. U. S. Bank*, 8 *Wheaton*, 469; *Moss v. Rossie Mining Co.*, 5 *Hill*, 137; *Graves v. Exchange Bank*, 17 *N. Y.*, 205; *Vanbibber v. La. Bank*, 14 *La.*, 481; *Story Agency*, *sec.* 244.)

It follows that the plaintiff below, if the indorsement is a forgery, has the first right of action. That of the drawer is postponed to his. This is well settled by adjudicated cases, and is laid down in the text books.—(*Morgan v. Bank of New York*, 1 *Duer*, 434; *Aff'd. in* 1 *Kernan*, 404; *Graves v. Exchange Bank*, 17 *New York*, 205; *Vanbibber v. Bank of Louisiana*, 14 *La.*, 481; *Smith v. Mechanic's Bank*, 6 *La.*, 616; 2 *Parsons Bills*, 81.) The instruction now under discussion excluded this effect of

payment on a forged endorsement, and on this ground also was properly refused.

3. The two foregoing considerations, relieving the defendant in error from the conditions and restrictions of the refused instruction, are applicable to check in general and depend upon common law principles. But he has a further especial statutory and urgent right. The plaintiff in error is in this case not merely a bank holding the deposits of a customer and transacting ordinary banking business; it is more intimately connected with the government than was the old Bank of the United States. It is, as its own check imports, a financial agent of the United States. In the province of its agency it is more directly and completely the representative of its principal because the government can only act through its proper agent. For honorable and perilous services the defendant in error is a creditor of the United States. The money for his payment is appropriated by law; his demand is admitted and definitely ascertained and payable in money, and this check is the proper order for his payment. It is the obligation of the government, upon proper presentment of which he has a legal right to demand the money it calls for.

The plaintiff in error, within the scope of its agency for the debtor, holds the sum set apart for the payment of this creditor. It holds it therefore to his use, payable on his proper demand, which is the presentment of this check. And the requirements upon the bank to promptly pay it on rightful presentment exceed the ordinary obligations of a debtor to his creditor. By statute, refusal by such an agent to obey such an order and promptly pay such a check is, upon trial of an indictment, prima facie evidence of embezzlement; claiming credit for it without payment to the creditor is conversion of the amount, punishable by fine and imprisonment. Of these statutory requirements for prompt payment to him, the

government's creditor is the beneficiary. The right of the defendant in error, then, is not deferred until the fiscal agent of the government, whose simple definitive duty is to pay, shall deign, by acceptance of the check, to ratify the order of the government, and thus promise him his money on a future occasion. It is his right, and the command of the law, to be paid by the plaintiff in error on the first presentment of the check.—(*Act Feb.* 25, 1863, 12 *St. Lar.*, 668; *act June* 3, 1864, 13 *Id.*, 99; *act Aug.* 6, 1846, 9 *Id.*, 59; *McCulloch v. Maryland*, 4 *Wheaton*, 316; *Osborne v. U. S. Bank*, 9 *Wheaton*, 738; *Kennedy v. Gibson*, 8 *Wallace*, 498.)

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